

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KIM ROBERT DELAVERGNE,)
Plaintiff,) CASE NO. C13-1471-JCC-MAT
v.)
WASHINGTON STATE DEPARTMENT) REPORT AND RECOMMENDATION
OF CORRECTIONS, et al.,)
Defendants.)

Plaintiff, proceeding *pro se* and *in forma pauperis*, submitted a proposed 42 U.S.C. § 1983 civil rights complaint. (Dkt. 5.) He named as defendants the Washington State Department of Corrections (DOC), Director of Prisons Bernard Warner, Dr. Kenneth Lauren, Dr. Edwards, PA Sherlie Niesner, ARNP Roberta Kanive, Medical Director Dr. Steven Hammond, Dr. Jauling, Dr. Stanley Fleming, Dr. Gordon Irving, and Dr. Collins, and raised claims associated with his medical treatment.

By Order dated August 22, 2013, the Court issued an Order declining to serve and granting plaintiff an opportunity to amend. (Dkt. 7.) The Court noted deficiencies in the

01 proposed complaint as set forth below.

02 In order to sustain a § 1983 claim, plaintiff must show (1) that he suffered a violation of
03 rights protected by the Constitution or created by federal statute, and (2) that the violation was
04 proximately caused by a person acting under color of state or federal law. *West v. Atkins*, 487
05 U.S. 42, 48 (1988); *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). Neither states,
06 nor entities that are arms of the state, such as the Washington State DOC, are persons for
07 purposes of § 1983. *Howlett v. Rose*, 496 U.S. 356, 365-66 (1990); *Hale v. Arizona*, 993 F.2d
08 1387, 1398 (9th Cir. 1993) (en banc). Accordingly, plaintiff's claims against the DOC must be
09 dismissed.

10 A plaintiff in a § 1983 action must allege facts showing how individually named
11 defendants caused or personally participated in causing the harm alleged in the complaint.
12 *Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981). A plaintiff may not hold supervisory
13 personnel liable under § 1983 for constitutional deprivations under a theory of supervisory
14 liability. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Rather, a plaintiff must allege
15 that a defendant's own conduct violated the plaintiff's civil rights.

16 In this case, plaintiff appears to allege an Eighth Amendment violation through medical
17 treatment and risk to his safety. However, he fails to set forth facts demonstrating how a
18 number of the named defendants personally participated in causing him harm of constitutional
19 dimension. In particular, he sets forth no basis for including defendants Warner, Dr.
20 Hammond, or Dr. Jauling in this matter, and, indeed, does not reference those individuals

01 within the body of his complaint.¹ He appears to improperly include Warner and Dr.
02 Hammond under a theory of supervisory liability. As such, plaintiff's claims against Warner
03 and Drs. Hammond and Jauling are subject to dismissal.

04 Because of the deficiencies described above, the Court declined to serve the complaint
05 or to direct that an answer be filed. However, the Court granted plaintiff leave to amend his
06 complaint, if possible, to correct the identified deficiencies within thirty days from the date of
07 the Court's August 22, 2013 Order. The Court noted that, if no amended complaint was timely
08 filed, the Court would recommend that this matter be dismissed.

09 On August 26, 2013, the Court received a letter from plaintiff in which he raised a
10 question as to the correct cause number in this action and clarified that Drs. Fleming and Irving,
11 and "Dr. Collins of Washington Corrections Center a PHD MD" are not defendants, while "Dr.
12 William Collins MD is a defendant of Monroe Command Center (TRU)." (Dkt. 9.)
13 However, as the letter contains an August 23, 2013 postmark (*see id.* at 5), it does not appear it
14 was submitted in response to the Court's Order to Show Cause. Nor does the letter otherwise
15 respond to deficiencies addressed in the Court's Order.

16 It remains that, to date, the Court has not received an amended complaint from plaintiff.
17 The Court, therefore, now recommends plaintiff's complaint be dismissed. The Court
18 recommends plaintiff's claims against the DOC and against Drs. Fleming and Irving be
19 dismissed with prejudice for the reasons set forth above. However, because it remains to be
20 seen whether plaintiff can state any claims against the remaining individual defendants, the

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22 ¹ Nor did plaintiff address the involvement of Drs. Fleming, Irving, or Collins. However, as
stated below, plaintiff indicated in a letter to the Court that he did not intend to include at least Drs.
Fleming and Irving as defendants, and his intention regarding Dr. Collins remains unclear. (Dkt. 9.)

01 Court recommends plaintiff's claims against those individuals be dismissed without prejudice.

02 A proposed Order accompanies this Report and Recommendation.

03 DATED this 11th day of October, 2013.

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06 Mary Alice Theiler
07 Chief United States Magistrate Judge
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